No. 06-11543

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IN THE SUPREME COURT OF THE UNITED STATES

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LARRY BEGAY, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's prior felony convictions for driving while intoxicated qualify as "violent felonies" under 18 U.S.C. 924(e).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A46) is reported at 470 F.3d 964. The opinion of the district court (Pet. App. D1-D7) is reported at 377 F. Supp. 2d 1141.

## JURISDICTION

The judgment of the court of appeals was entered on December 12, 2006. A petition for rehearing was denied on February 21, 2007 (Pet. App. B1). The petition for a writ of certiorari was filed on May 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). The district court determined that petitioner had at least three prior convictions for "violent felonies" as defined by the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), and it sentenced him to 188 months of imprisonment under that Act. The court of appeals affirmed.

1. In September 2004, after a night of heavy drinking, petitioner pointed a .22 caliber rifle at Helen Begay, a family member, and threatened to kill her if she would not give him some money. When she replied that she had no money, petitioner repeatedly pulled the rifle's trigger. The rifle, fortunately, was not loaded. Petitioner then approached his sister, Annie Begay, and threatened her with the rifle in a similar fashion. Petitioner was subsequently arrested and charged with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). He pleaded guilty to that offense. Pet. App. A2, D2; see Gov't C.A. Br. 2-3; Presentence Report (PSR) ¶¶ 1-4, 8-17.

2. At sentencing, the district court found that petitioner qualified for a sentencing enhancement under the ACCA, which provides for a mandatory minimum 15 years of imprisonment for a defendant who (a) is convicted of possessing a firearm as a felon

and (b) has three previous convictions for a "violent felony." The statute defines "violent felony" to include burglary, arson, extortion, an offense involving the use of explosives, or an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

It was undisputed that petitioner had at least 12 convictions in the State of New Mexico for driving while intoxicated (DWI), in violation of N.M. Stat. Ann. § 66-8-102.[1] Pet. App. A2-A3, A29, D2. It was likewise undisputed that at least three of those convictions were felony DWIs. Ibid. Petitioner argued, however, that the convictions could not be considered "violent felonies" under the ACCA. Id. at D4. The district court rejected that contention, concluding with "no difficulty" that the convictions "involve conduct that presents a serious potential risk of physical injury to another." Id. at D7. Having so concluded, the court found that petitioner was subject to a mandatory minimum of 180 months of imprisonment, 18 U.S.C. 924(e)(1); a base offense level of 34, Sentencing Guidelines § 4B1.4 (specifying base offense level for defendant "subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)"); and a Guidelines imprisonment range of 188

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[1] In addition, petitioner was arrested at least ten other times for drunk driving. Pet. App. D2.

to 235 months.[2] Sent. Tr. 13-14; see Pet. App. A3. The court sentenced petitioner to 188 months of imprisonment, to be followed by three years of supervised release. Pet. App. C2-C3.

3. A divided court of appeals affirmed in relevant part.[3] Pet. App. A1-A46.

a. The court noted at the outset (Pet. App. A5) that Taylor v. United States, 495 U.S. 575 (1990), mandates a "categorical approach" to determining whether a prior offense is a "violent felony" under the ACCA, such that the court was bound to "look only to the statutory definition" of that offense. Turning to the conduct prohibited by N.M. Stat. Ann. § 66-8-102, the court concluded that driving while intoxicated "otherwise involves conduct that presents a serious potential risk of physical injury to another," such that DWI falls within the "ordinary meaning" of Section 924(e)(2)(B)(ii). Pet. App. A5, A15; see id. at A14 ("DWI

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[2] Absent the ACCA enhancement, petitioner's advisory Guidelines range of imprisonment would have been 41 to 51 months. See Pet. App. A29.

[3] Although the court of appeals affirmed (by a vote of two to one) the district court's application of the 180-month mandatory minimum pursuant to the ACCA enhancement, it unanimously held that the district court had erred in imposing a 188-month sentence on the understanding that, "in order for me to go below the guidelines, I have to make a finding that * * * [a] sentence of 188 months [would be] unreasonable." Pet. App. A4, A24, A46. The court of appeals remanded for resentencing on the ground that a sentencing court "may impose a non-Guidelines sentence if the sentencing factors set forth in [18 U.S.C.] 3553(a) warrant it, even if a Guidelines sentence might also be reasonable." Pet. App. A24, A27.

certainly presents such a risk. Many would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers.").

b. In separate opinions, the two judges in the majority (Judge Lucero and Judge Hartz) rejected petitioner's contention (Pet. App. A6) that the ACCA's "otherwise" clause extends only to those offenses that are similar to the enumerated crimes of burglary, arson, extortion, and offenses involving explosives.

In an analysis that Judge Lucero did not join, Judge Hartz concluded that the "otherwise" clause could not bear the narrow "similar crimes" interpretation that petitioner advocated, given (inter alia) that (1) the ACCA's broad statutory purpose is to punish more severely those felons in possession "who have a confirmed history of displaying contempt for human life or safety," such that "there is nothing remarkable about including felony DWI as a 'violent felony,'" Pet. App. A17; (2) the circuits that have addressed the matter have unanimously held that the similarly-worded "otherwise" clause in Sentencing Guidelines § 4B1.2(a)(2) encompasses DWI, Pet. App. A17-A18[4]; (3) the legislative history of Section 924(e)(2)(B)(ii) shows that the specific crimes of

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[4] Section 4B1.2(a)(2) defines the term "crime of violence," for purposes of the Guidelines' career offender provision, to include burglary of a dwelling, arson, extortion, offenses involving the use of explosives, and offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."

burglary, arson, extortion, and offenses involving the use of explosives were added to the provision only after introduction of the general language "involves conduct that presents a serious potential risk of physical injury to another," which chronology suggests that "the addition of the specific language was [simply] to make clear * * * that the term violent felony encompassed the newly listed offenses" in addition to a wide range of other safety-threatening offenses like DWI, Pet. App. A19-A20; and (4) the "primary definition" of the word "otherwise" is "in a different way or manner," such that the clause that follows that word is properly understood to include "conduct that presents (in a manner different from burglary, arson, etc.) a serious risk of physical injury to another," id. at A22. Judge Hartz further concluded (id. at A20-A22) that the interpretive canons of ejusdem generis and noscitur a sociis were inapplicable because the "ordinary, natural meaning" of the statute plainly encompasses DWI.

In a short concurring opinion, Judge Lucero agreed that "a conviction for felony driving while under the influence falls within the ambit" of Section 924(e)(2)(B)(ii). Pet. App. A28. Indeed, Judge Lucero concluded (ibid.) that "the language of the statute is so clear and unambiguous that it does not allow resort to the legislative history." Thus, while Judge Lucero believed (ibid.) that DWI "may not have been in the minds of the 1986 amendment's sponsors when they drafted [Section 924(e)(2)(B)(ii)'s]

residual language," he concluded that the language's plain meaning extends to DWI, such that "if any change is to be made, it is for Congress, not the courts, to make."

c. Judge McConnell dissented in relevant part. Pet. App. A29-A46. In Judge McConnell's view (id. at A33-A34), the ACCA's "otherwise" clause is "susceptible to two linguistically plausible interpretations": the majority's "all crimes" interpretation or petitioner's "similar crimes" interpretation. Faced with this purported ambiguity, Judge McConnell believed that the "similar crimes" interpretation was the better one, given (inter alia) that (1) the enumerated crimes of burglary, arson, extortion, and offenses involving the use of explosives are "potentially more dangerous when firearms are involved," whereas "drunk driving is not of this nature" because it is a "crime of negligence or recklessness * * * rather than violence or aggression," Pet. App. A34-A35; see id. at A43; (2) a House Report pertaining to Section 924(e)(2)(B)(ii) stated that the provision would "add * * * crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses," Pet. App. A38 (quoting H.R. Rep. No. 99-849 (1986)); (3) the canons of ejusdem generis and noscitur a sociis support the "similar crimes" interpretation, id. at A44-A45; and (4) to the extent that the statute remains ambiguous after resort to the legislative history and the foregoing canons, the rule of lenity counsels in favor of

the narrower, "similar crimes" interpretation, id. at A45-A46.

4. The court of appeals denied petitioner's petition for rehearing or rehearing en banc, with no judge in regular active service calling for a vote on the petition. Pet. App. B1.

ARGUMENT

Petitioner contends (Pet. 5-16) that his felony DWI convictions do not qualify as "violent felonies" under the ACCA. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. As an initial matter, review should be denied because the court of appeals remanded the case to the district court for resentencing. The court of appeals unanimously held that the district court had erred in concluding that it could only impose a sentence below the minimum Guidelines range (188 months of imprisonment) if it determined that the minimum range was unreasonable. The court of appeals made clear that on remand, the district court could impose a non-Guidelines sentence if the sentencing factors set forth in 18 U.S.C. 3553(a) warrant it, even if a Guidelines sentence would also be reasonable. Pet. App. A24, A27. The interlocutory posture of the case alone supports denial of the petition for a writ of certiorari. See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); Virginia Military Inst. v. United States, 508 U.S. 946

(1993) (Scalia, J., concurring).

2. A "crime punishable by imprisonment for a term exceeding one year" qualifies as a "violent felony" under the ACCA if the offense meets certain criteria set out in the statute or "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court has held that the ACCA generally requires a "categorical approach" to determining whether or not an offense constitutes a "violent felony." Taylor v. United States, 495 U.S. 575, 600 (1990). Under that approach, sentencing courts must "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying th[e] convictions." Ibid.[5]

3. Petitioner does not dispute that the court of appeals followed the Taylor approach. Nor does he dispute that felony DWI, as defined by N.M. Stat. Ann. § 66-8-102, "presents a serious potential risk of physical injury to another." Instead, he contends (Pet. 6, 10-15) that the ACCA's "otherwise" clause must be construed to embrace only offenses similar to those encompassed by the words that precede it in Section 924(e)(2)(B)(ii), and that felony DWI is not sufficiently similar to those enumerated offenses

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[5] A sentencing court may look beyond the fact of conviction when the statute under which the defendant was convicted embraces conduct that categorically constitutes a violent felony as well as conduct that does not. See Taylor, 495 U.S. at 602; Shepard v. United States, 544 U.S. 13 (2005). That modified categorical approach is not at issue here.

(i.e., burglary, arson, extortion, and explosives offenses) because it does not present the same "confrontational risk" that they do. That contention is without merit.

a. In James v. United States, 127 S. Ct. 1586 (2007), this Court addressed the question "whether attempted burglary, as defined by Florida law, is a 'violent felony' under ACCA." Id. at 1590. The Court answered that question in the affirmative, concluding that attempted burglary -- though it is not burglary, arson, extortion, or an explosives offense -- "otherwise involves conduct that presents a serious potential risk of physical injury to another." Id. at 1591-1599. In so holding, the Court rejected James's reliance on the ejusdem generis canon for the proposition that, inasmuch as each of the enumerated offenses is a completed offense, the "otherwise" clause similarly encompasses only completed offenses. Id. at 1592-1593. In the Court's view, James's interpretation "would unduly narrow" the clause's "expansive phrasing," "which does not suggest any intent to exclude attempt offenses that otherwise meet the statutory criteria." Id. at 1592. The Court emphasized that "Congress' inclusion of [such] a broad residual provision * * * indicates that it did not intend the preceding enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others and therefore merit status as a § 924(e) predicate offense." 127 S. Ct. at 1593 (emphasis added); see id. at 1597 ("As long as

an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision.").

b. The Court's approach to Section 924(e)(2)(B)(ii) in James undermines petitioner's contention that the provision excludes felony DWI simply because that offense does not present the same type of risk that the provision's enumerated offenses do. 127 S. Ct. at 1591-1599. Just as in James, petitioner's proposed limitation of the "otherwise" clause to offenses that present a "confrontational risk" (e.g., Pet. 6) "would unduly narrow" the clause's "expansive phrasing," "which does not suggest any intent to exclude" non-confrontational offenses "that otherwise meet the statutory criteria." Id. at 1592; cf. Harrison v. PPG Indus., Inc., 446 U.S. 578, 588-589 (1980) (rejecting application of the ejusdem generis canon where the Court "discern[ed] no uncertainty in the meaning of" the statute at issue and where the statute's "expansive language offer[ed] no indication whatever that Congress intended the limiting construction * * * that the respondents * * * urge[d]").

Indeed, this Court emphasized in James that "the most relevant common attribute of the [ACCA's] enumerated offenses * * * is that all of [them] * * * create significant risks of bodily injury or confrontation that might result in bodily injury." Id. at 1592 (emphasis added). A "similar crimes" limitation to the "otherwise"

clause is inconsistent with this Court's recognition that the listed crimes themselves are dissimilar and that a risk of bodily injury is alone sufficient to explain the inclusion of certain crimes. As Judge Hartz explained (Pet. App. A19-A20), the crimes expressly enumerated in Section 924(e)(2)(B)(ii) are merely examples of offenses that "present[] a serious potential risk of physical injury to another." As the Eighth Circuit noted in concluding that felony DWI is a "violent felony" for purposes of the ACCA, Congress listed burglary, arson, extortion, and explosives offenses out of an abundance of caution to make clear that those examples meet the operative statutory criterion. United States v. McCall, 439 F.3d 967, 971 (8th Cir. 2006) (en banc) ("[t]he form of the addition [to the statute] made the 'otherwise involves' provision look like a catchall when in fact it was initially the operative provision," and therefore "it is wrong to infer that Congress intended to limit the 'otherwise involves' provision to offenses that are similar to the enumerated add-ons"); see Taylor, 495 U.S. at 589 (the addition of the enumerated offenses "seemingly was meant simply to make explicit the provision's implied coverage of crimes such as burglary").

4. The decision below is fully consistent with the foregoing principles and with the decisions of this Court and the other courts of appeals.

a. As mentioned, the Eighth Circuit has concluded that

felony DWI is a "violent felony" under the ACCA. McCall, 439 F.3d at 970-973. In so holding, the Eighth Circuit rejected the same "similar crimes" argument that petitioner raises in an effort to limit Section 924(e)(2)(B)(ii)'s "otherwise" clause. Id. at 970-971. The Seventh Circuit has likewise concluded that felony DWI falls within the "otherwise" clause. United States v. Sperberg, 432 F.3d 706, 708-709 (7th Cir. 2005). Additionally, every court of appeals to consider the question has agreed that DWI falls within the identically worded "otherwise" clause in Sentencing Guidelines § 4B1.2(a)(2). United States v. DeSantiago-Gonzales, 207 F.3d 261, 264 (5th Cir. 2000); United States v. Veach, 455 F.3d 628, 635-637 (6th Cir. 2006); United States v. Moore, 420 F.3d 1218, 1221 (10th Cir. 2005); United States v. McGill, 450 F.3d 1276, 1280 (11th Cir. 2006); see supra p. 5. As this Court observed in James (127 S. Ct. at 1596), Section 4B1.2(a)(2)'s "definition of 'crime of violence' closely tracks ACCA's definition of 'violent felony,'" in that both terms identically include burglary, arson, extortion, explosives offenses, and offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." Accordingly, the court of appeals correctly concluded (Pet. App. A12) that the "all crimes" interpretation endorsed in the foregoing Guidelines cases "is also correct for the ACCA."

b. Although Judge McConnell suggested in dissent (Pet. App.

A31-A32) that Leocal v. Ashcroft 543 U.S. 1 (2004), supports petitioner's "similar crimes" interpretation of the ACCA, the majority's "all crimes" interpretation is entirely consistent with Leocal. In Leocal, this Court held that a DUI offense is not a "crime of violence" under 18 U.S.C. 16. But Section 16 differs in important respects from Section 924(e). Under Section 16, a "crime of violence" includes "any other offense that * * * involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. 16(b) (emphases added). In Leocal, the Court focused on the requirement that "physical force" be "used against" a person, 543 U.S. at 9, and it concluded that Section 16 demands a higher degree of mens rea than "the merely accidental or negligent conduct involved in a DUI offense." 543 U.S. at 11. In contrast, the ACCA's "violent felony" definition is not limited to offenses involving a substantial risk that "physical force" will be "used." Instead, it reaches all felonies involving "conduct that presents a serious potential risk of physical injury." 18 U.S.C. 924(e)(2)(B)(ii); see James, 127 S. Ct. at 1597 ("As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision."). For that reason, Leocal expressly distinguished Sentencing Guidelines § 4B1.2(a)(2) -- which, as noted, parallels the ACCA -- by emphasizing that Section 16 "plainly does not encompass all

offenses which create a 'substantial risk' that injury will result from a person's conduct." 543 U.S. at 10 n.7.

c. Relatedly, petitioner errs in suggesting (Pet. 12-13) a conflict with United States v. Doe, 960 F.2d 221 (1st Cir. 1992) (Breyer, J.). Doe held that a conviction for being a felon in possession of a firearm is not a "violent felony" under Section 924(e). 960 F.2d at 224-226. As the court explained, "simple possession of a firearm does not fit easily within the literal language of the statute," because it is difficult "to imagine such a risk of physical harm often accompanying the conduct that normally constitutes firearm possession." Id. at 224-225. Although the court did suggest that "[t]here is no reason to believe that Congress meant to enhance sentences based on, say, proof of drunken driving convictions," id. at 225, that statement was dicta, and there is no conflict between Doe's holding and the decision below.

5. Finally, this Court in Gwartney v. United States, 127 S. Ct. 2097 (2007), denied review of another Tenth Circuit decision involving the same question presented here. There is no reason for a different result in this case. To the extent that petitioner seeks this Court's intervention based on the "strong dissents" in McCall and the decision below, review at this juncture would be particularly imprudent because James was decided after those dissents were written. Given James's further guidance about the

scope of Section 924(e)(2)(B)(ii), the dissenting judges to whom the petition refers might well refine or reconsider their analyses. In any event, those dissents do not represent the law in any circuit, and they do not warrant this Court's intervention.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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